STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS CORPORATION, Plaintiff-Appellant,	UNPUBLISHED July 24, 2007
v	No. 270430 Wayne Circuit Court
ALUMI-BUNK, INC., and ERIC JAIN Defendants-Appellees.	LC No. 04-422587-CB

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff General Motors Corporation (GM) appeals as of right from an order granting the motions for summary disposition filed by defendants Alumi-Bunk, Inc. (AB), and Eric Jain, a vice president of AB. We affirm in part, reverse in part, and remand for further proceedings.

In 2003, defendants sought to purchase hundreds of Chevrolet Silverado trucks from an Ohio dealer. Defendants eventually purchased 148 of the trucks and obtained a substantial "Competitive Assistance Program" (CAP) discount – $7,200 a vehicle – from GM.[1] GM contends that it granted the discount only "to pursue penetration in the separate market segment for substantially modified vehicles." GM contends that defendants agreed to modify, or "upfit," the vehicles before reselling them, so that they would not compete with other non-modified vehicles on the market. However, defendants sold the vehicles without modifications. GM contends that defendants therefore obtained "an unjustified windfall of $1,065,600."

GM filed a complaint on July 22, 2004, setting forth counts of, among other things, fraud; negligent, innocent, and/or intentional misrepresentation; and breach of an express or implied contract.

Mark Kline, a former employee with Ganley Chevrolet, Inc., the dealership that sold the trucks in question, testified at his deposition that defendants had been interested in purchasing a large number of trucks to "convert to fifth-wheel hauler[s]." He testified that Jain represented in July and August of 2003 that he planned to upfit the vehicles. Kline indicated that, based on

[1] Although the vehicles were purchased from the dealer, the price was authorized by plaintiff.

Jain's representations, he put Jain in contact with the individuals at GM who dealt with "fleet sales." Kline stated that GM would not offer a CAP discount "without a requirement that the vehicles purchased be up-fitted."

In the record is an email from Jain to Eric Raich, a GM employee who deals with fleet sales, that is dated August 18, 2003, and that states, in part: "I appreciate your concern however, rest assured all vehicles will be titled and upfitted and packed with our product when it is sold. Also, I am faxing you the signed CAP sheet. Hopefully I will have the order finalized with Mark today." Reich testified at his deposition that Jain assured him that the trucks would be upfitted. Michael Lambregtse, another GM employee who deals with fleet sales, also indicated that Jain had assured GM that the trucks would be upfitted. Lambregtse stated: "We had an agreement with Mr. Jain that he did put in [an email] to us that he was going to do a substantial upfit on these vehicles, and that was the agreement that we had with him."

AB moved for summary disposition of GM's claims under MCR 2.116(C)(8) and (10). AB argued that GM's contract claims were untenable because the written contract between GM and AB that memorialized the CAP discount contained no requirement that the vehicles be upfitted. AB also argued that the "economic loss" doctrine[2] barred GM's tort claims because the doctrine mandated that any remedy GM sought had to be obtained under Uniform Commercial Code (UCC) contract principles. AB further argued that the UCC barred any claim for lost profits.

Jain also moved for summary disposition under MCR 2.116(C)(8) and (10), making similar arguments to those made by AB and also arguing that (1) he was not a party to the pertinent contract and (2) GM's fraud and misrepresentation claims were untenable because they related to a future event, i.e., the upfitting of the trucks.

GM responded to defendants' motions by arguing, among other things, that (1) the UCC was inapplicable because the transaction related to the sale of intangible assets, (2) the economic loss doctrine was inapplicable, (3) GM's fraudulent inducement claim was not barred by the economic loss doctrine in any event, (4) the written agreement relating to the CAP discount was not integrated and therefore parol evidence was admissible to determine the intent of the parties, and (5) Jain was "personally liable for the misrepresentations he made to GM, whether he was acting on his own behalf or on that of [AB]."

After hearing oral arguments, the trial court granted defendants' motions, stating, in part:

> There's clearly a contract here where [AB] is purchasing these vehicles. And it's a written contract and the written contract I think it's pretty much agreed

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[2] As stated in *Neibarger v Universal Cooperative, Inc*, 439 Mich 512, 520; 486 NW2d 612 (1992), "[t]he economic loss doctrine, simply stated, provides that [w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses" (internal citations and quotation marks omitted).

> doesn't say anything about upfitting. There's a significant discount, to be sure, but the contract doesn't speak to that. And there's no representation in the contract about upfitting and what's required for the upfitting. And this is really GM's contract and any ambiguities or unclearness is construed against [GM].
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> And really, as I looked at the whole issue, because I was really kind of struggling with this case, the only case that I thought came close to keeping [GM's] case alive is the argument that you make about fraud in the inducement. . .
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> But . . . really the fraud claim has to be independent of contract claims. And there, the fraud and the contract claim is [sic] so intertwined and it's really the contract claim itself, and this fraud in the inducement that you're arguing really is part and parcel of the contract itself.
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> And, you know, to get right to the bottom line, I really just don't see that [GM] has any leg to stand on in this case. The UCC applies and you've done a very creative job in trying to separate out this representation about the upfitting from the contract itself, but that's a very extremely [sic] strained argument to say that this case doesn't fall within the UCC.
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> . . . I just don't really see that there's a prima facie case with regard to these allegations. . . .
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> . . . I really just don't see how Mr. Jain can be held liable in any way personally on this contract because everything he said and he did was part and parcel of him representing [AB]. . . .
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> And I think this is really just a case where GM kind of got caught with, as they say, with their pants down because the upfitting agreement or any upfitting allegations should have been written right into the contract. It should have been part and parcel of the written contract. And now for GM to turn around and say that this upfitting obligation is part of this agreement and they were – [AB] was to do this or that and nobody even knows what this or that was. And again, that ambiguity is to be construed against the drafter.

The court then issued an order granting defendants' motions for summary disposition "for the reasons stated . . . on the record."

On appeal, GM first argues that the trial court erred in concluding that the contract at issue fell within the purview of the UCC. This issue primarily involves statutory interpretation. We review issues of statutory interpretation de novo. *Hamilton v AAA Michigan*, 248 Mich App 535, 540; 639 NW2d 837 (2001). "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Id.* at 541. "The first criterion in determining legislative intent is the specific language of the statute. . . . If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted . . . ." *Id.*

MCL 440.2102 states that "this article applies to transactions in goods . . . ." MCL 440.2105(1) states, in part: "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action." Additionally, "[a] 'sale' consists in the passing of title from the seller to the buyer for a price . . . ." MCL 440.2106(1).

GM argues that the contract at issue here was not for the sale of goods but was for "[d]efendants' ability to obtain a volume discount on the trucks to be purchased in the future from an independent dealership, Ganley Chevrolet. The right to that discount was the subject matter of the discount agreement." In making its argument, GM relies primarily on *Lorenz Supply Company v American Standard, Inc (Lorenz I)*, 100 Mich App 600; 300 NW2d 335 (1980). In *Lorenz*, the plaintiff orally agreed to purchase certain plumbing inventory and "to assume responsibility for defendant's outstanding delivery orders" in exchange for "a preferred distributorship of defendant's products in [a particular] area." *Id*. at 604. The defendant argued that the UCC's statute of frauds applied to the distributorship agreement because it was "in effect, a contract for the sale of goods . . . ." *Id*. at 607. This Court stated:

> [T]he Code applies to a present sale of existing and identified goods or to a contract where the parties agree to the sale of goods at a future time. In the instant case, Lorenz was granted the status of a "preferred distributor" who would be entitled to purchase plumbing fixtures manufactured by the defendant in the future. The agreement did not require Lorenz to buy a certain quantity of goods or, indeed, to buy any goods from the defendant in the future. This agreement envisioned an ongoing economic relationship between Lorenz and defendant for their mutual benefit, rather than a contract of sale. Thus, we conclude that the trial court was correct in ruling that the UCC did not apply, and Lorenz was not precluded from asserting the oral distributorship agreement by operation of the Statute of Frauds. [*Id*. at 608.]

In our opinion, *Lorenz I* does indeed provide some support for GM's argument on appeal. Indeed, the contract between GM and AB did not require the purchase of goods but merely specified a price at which AB could obtain the trucks in question in the future. However, in *Lorenz Supply Company v American Standard, Inc (Lorenz II)*, 419 Mich 610, 615 n 8; 358 NW2d 845 (1984), the Supreme Court, while affirming this Court's judgment, stated, "We express no opinion on the question whether a distributorship agreement may fall within the broader category of 'transactions in goods' within the meaning of § 2-102 of the UCC, MCL 440.2102 . . . ."

In our opinion, the contract in question clearly fell within the scope of MCL 440.2102. As noted in *Hamilton*, *supra* at 541, the plain and ordinary meaning of terms in a statute controls. Random House Webster's Dictionary (2nd ed) defines "transaction" as "the act or process of transacting . . . ." It defines "transact" as "to carry on or conduct (business, negotiations, etc.) to a conclusion or settlement." Clearly, the contract regarding the CAP discount involved the conducting of business concerning the trucks, which are "goods" under the UCC. Therefore, we reject GM's argument that the court erred in concluding that the contract at issue here was governed by the UCC.

GM next argues that its contract claim was tenable because parol evidence was admissible to show that defendants were required to upfit the trucks in order to receive the CAP discount. This issue involves a question of law. We review issues of law de novo. *Mather Investors, LLC v Larson*, 271 Mich App 254, 256; 720 NW2d 575 (2006).

"The parol evidence rule may be summarized as follows: '[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.'" *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). However,

> parol evidence of prior or contemporaneous agreements or negotiations is admissible on the threshold question whether a written contract is an integrated instrument that is a complete expression of the parties' agreement. *In re Skotzke Estate*, 216 Mich App 247, 251-252; 548 NW2d 695 (1996); *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 410-411; 285 NW2d 770 (1979). The *NAG* Court noted four exceptions to the parol evidence rule, stating that extrinsic evidence is admissible to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. *NAG*, *supra* at 410-411 . . . . See also 4 Williston, Contracts, § 631. Importantly, neither *NAG* nor *Skotzke* involved a contract with an explicit integration clause. [*UAW-GM Human Resource Center*, *supra* at 492-493.]

Here, the contract contained no integration clause. Therefore, at first blush, it appears that parol evidence was admissible to show whether the written contract was "a complete expression of the parties' agreement." *Id*. at 492. However, as discussed above, this case is governed by the UCC. The UCC states:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
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> (a) by course of dealing or usage of trade . . . or by course of performance . . . and
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> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. [MCL 440.2202.]

The commentary to MCL 440.2202 states, in part:

> Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

In our opinion, the upfitting requirement was a significant factor and therefore was something that "if agreed upon . . . would certainly have been included in the document . . . ." Therefore, we conclude that parol evidence was not admissible to supplement GM's claim of breach of contract. The trial court correctly dismissed the contract claim.

GM argues that even if its claim based on an express contract is untenable, it nonetheless had a viable claim based on an implied contract. This argument is patently without merit and does not warrant an extended discussion. As noted in *Barber v SMH (US), Inc*, 202 Mich App 366; 509 NW2d 791 (1993), "a contract will be implied only if there is no express contract covering the same subject matter." The subject matter here – the sale of trucks at a CAP discount – was covered by an express contract. Reversal on this basis is unwarranted.

GM argues that, even if its *contract* claims are untenable, a claim of fraudulent inducement remains actionable[3] because "fraudulent inducement claims are not barred by the economic loss doctrine." This issue, too, presents a question of law, so we will review it de novo. *Mather Investors, supra* at 256.

As noted earlier, "[t]he economic loss doctrine, simply stated, provides that [w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in *contract alone*, for he has suffered only economic losses" *Neibarger v Universal Cooperative, Inc*, 439 Mich 512, 520; 486 NW2d 612 (1992) (emphasis added; internal citations and quotation marks omitted). Accordingly, the economic loss doctrine mandates that disputes regarding the sale be governed by the UCC. *Id*. at 527-528. However, GM correctly argues that claims of fraudulent inducement are not barred by the economic loss doctrine. See *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 372-374; 532 NW2d 541 (1995). As noted in *Huron Tool*,

> [f]raud in the inducement presents a special situation where parties to a contract appear to negotiate freely – which normally would constitute grounds for invoking the economic loss doctrine – but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. In contrast, where the only misrepresentation by the dishonest party concerns the quality or character of the goods sold, the other party

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[3] We do not consider the claims for negligent, innocent, and/or intentional misrepresentation separately in this opinion because they appear to be subsumed by the claim for fraudulent inducement. Indeed, GM does not make a separate argument on appeal with regard to the claims for negligent, innocent, and/or intentional misrepresentation.

> is still free to negotiate warranty and other terms to account for possible defects in the goods. [*Id*. at 372.]

The *Huron Tool* Court further noted:

> The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.
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> Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim. . . . [It] is undergirded by factual allegations identical to those supporting their breach of contract counts. . . . This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract. . . . [*Id*. at 373 (internal citations and quotation marks omitted).]

Here, the alleged fraud was not "interwoven with the breach of contract." *Id*. Instead, the purported fraud allegedly "induce[d] [GM] to enter into the original agreement . . . ." *Id*. The alleged misrepresentations did not "relate to the breaching party's performance of the contract." *Id*. Accordingly, the trial court erred in concluding that the fraudulent inducement claim was "part and parcel of the contract itself" and in dismissing the fraudulent inducement claim.

It is true that fraud claims cannot generally be predicated upon future actions. See *Rutan v Straehly*, 289 Mich 341, 348; 286 NW 639 (1939). "However, an unfulfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform." *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005); see also *Rutan*, *supra* at 348-349. Here, there was both evidence of improper inducement on the part of defendants and evidence that defendants agreed to the upfitting with the present intent *not to perform* the upfitting. Accordingly, questions of fact existed regarding GM's claim of fraudulent inducement.[4] Moreover, the fraudulent inducement claim is not

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[4] We conclude above that the upfitting requirement was a significant factor and therefore was something that "if agreed upon . . . would certainly have been included" in the written contract. There is evidence, however, that defendants did not *in truth* agree to this requirement, and if defendants did not intend to upfit the trucks, they would, of course, not have been eager to include an upfitting agreement in the written contract. Nevertheless, they still may have fraudulently represented to GM that they would indeed upfit the trucks and GM may have proceeded with the written contract with the unwritten, unilateral understanding that upfitting would occur. While it may seem unreasonable for GM to have entered into a written contract that failed to mention the upfitting requirement, this potential unreasonableness is perhaps a question for the trier of fact to consider when it analyzes the claim of fraudulent inducement.

governed by the UCC, so any damages to which GM might be entitled are not limited by the UCC.

GM next argues that the fraudulent inducement claim is viable against Jain as well as against AB.[5] Once again, this presents a question of law that we will review de novo. *Mather Investors*, *supra* at 256. As noted in *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545, 549; 701 NW2d 749 (2005), "[i]t is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort." Accordingly, GM has a viable claim against Jain.[6]

We must respond briefly to the claims made by the dissenting judge. First, the dissent fundamentally misunderstands the import of the *Huron Tool* case. As noted in *Huron Tool*, fraud interwoven with a breach of contract "relate[s] to the breaching party's performance of the contract and do[es] not give rise to an independent cause of action in tort." *Huron Tool*, *supra* at 373. For example, if a party contracted to purchase certain parts, with the representation from the seller that the parts would be in a certain condition, then the buyer's remedy after receiving defective parts would be *under the contract itself*, relying on a warranty clause or something similar. See *id*. at 372. The alleged breach would involve "the quality or character of the goods sold." *Id*. The situation here is fundamentally different and in fact represents a classic case of fraudulent inducement. The parties entered into a written contract, the terms of which were adhered to, but one party was allegedly *fraudulently induced* to enter into that contract.

The dissent also indicates that we are somehow misapplying the law by relying on evidence of a present intent not to perform. In fact, as noted earlier, this tenet is taken directly from *Foreman*, *supra* at 143, and represents binding law in Michigan. The dissent also indicates that we do not support our assertion that there was evidence of a present intent not to perform by citing to the lower court record. We note that the evidence of a present intent not to perform is derived from deposition testimony and a purchase order indicating that defendants had already made a deal to resell the vehicles, without any upfitting, at the time they entered into the contract.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

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[5] GM also argues that the contract claims are viable against Jain. However, this argument is moot, considering our conclusion that the contract claims are inherently untenable.

[6] We reject Jain's argument that GM did not plead its fraud claim with sufficient specificity.